STATE OF VERMONT
DEPARTMENT OF BANKING, INSURANCE, SECURITIES
AND HEALTH CARE ADMINISTRATION

In re: Application by the Vermont Department of Health for Conceptual Certificate of Need to create new inpatient programs to enhance psychiatric inpatient care and replace the functions currently performed by Vermont State Hospital	)))))	Docket No. 06-013-H

STATEMENT OF DECISION

Findings of Fact

Procedural History, Parties and Jurisdiction:

1. This matter comes before the Commissioner of the Department of Banking, Insurance Securities and Health Care Administration (the "Commissioner") on a Certificate of Need application entitled "Application by the Vermont Department of Health for Conceptual Certificate of Need to create new inpatient programs to enhance psychiatric inpatient care and replace the functions currently performed by Vermont State Hospital." ("VSH")

2. On June 20, 2006 the Vermont Department of Health , on behalf of the Agency of Human Services, filed a Letter of Intent for a Conceptual Certificate of Need to create new programs of inpatient mental health facility care, and to replace the functions currently performed by the Vermont State Hospital. The Letter of Intent estimates that capital expenditures in excess of $20,000,000 will be needed to develop the new programs. The Letter of Intent also describes the proposed new programs as intended to replace the current inpatient mental health facility, which has a capacity of 54 beds.

3. The Applicant is the Vermont Department of Health.

4. The Division of Health Care Administration ("the Division") of the Department of Banking, Insurance, Securities and Health Care Administration ("the Department") is considered a party in all Certificate of Need proceedings. (HCA Division Bulletin No. 112, Section 5.B)

5. The following persons or organizations requested "interested party" status, and were granted such status by the Commissioner in letters dated July 18, 2006, July 19, 2006, December 1, 2007, and December 11, 2006: the City of Burlington; the City of South Burlington; the City of Winooski; Geoffrey Hand, on behalf of the Burlington Ward One Neighborhood Planning Assembly; the Howard Center for Human Services; Martha Lang; Michael Sabourin; the Vermont Association for Mental Health; the Vermont Coalition for Disability Rights; the Vermont Council of Developmental and Mental Health Services; the Vermont Federation of Nurses and Health Professionals; Vermont Protection and Advocacy; the Vermont Psychiatric Association; Vermont Psychiatric Survivors; the Vermont State Employees' Association; and Laura Ziegler.

6. The National Alliance on Mental Illness requested "amicus curiae" status, and was granted such status by the Commissioner on July 19, 2006.

7. On July 19, 2006 the Division issued a Jurisdictional Determination stating that the proposed new health care project is subject to the jurisdiction of Vermont's Certificate of Need laws because the estimated capital expenditures of the proposed project exceed the statutory thresholds, and because the project proposes to change the number of beds of a health care facility through addition, conversion, or relocation.

8. The July 19, 2006 Jurisdictional Determination letter identified the statutory criteria under which the Application for a Conceptual Certificate of Need would be reviewed, leaving other statutory criteria to be reviewed and considered during the Phase II CON proceeding. The Jurisdictional Determination excluded for consideration during the Conceptual Certificate of Need proceeding certain HRAP Certificate of Need standards, and certain statutory standards, reasoning that consideration of the excluded standards would be premature, and would more appropriately be considered during the Phase II CON proceeding. In particular, while the Jurisdictional Determination recognized that issues of cost will be significant during the Phase II CON review, only preliminary information about funding, costs, staffing, and utilization are relevant during the Conceptual Certificate of Need review. The Jurisdictional Determination identified the following criteria and standards as relevant to the review:

(a) Statutory Criterion No. 1. The Application is consistent with the Health Resources Allocation Plan ("HRAP").

HRAP Standard No. 1. The project is needed to meet an identifiable, existing, or reasonably anticipated need.

HRAP Standard No. 2. The proposed health care project will facilitate the implementation of the HRAP concerning resources, needs, and appropriate system of delivery of health care services.

HRAP Standard No. 4. The project will help meet the needs of medically underserved groups and the goals of universal access to health services.

HRAP Standard No. 6. The proposal fosters the Vermont Blueprint for Health: the Chronic Care Initiative.

HRAP Standard No. 7. If the project proposes to, or is likely to, expand geographic access to services: the current travel time exceeds reasonable access standards; the cost to those who finance Vermont's health care system will not increase unreasonably; improvements in clinical outcome or quality of care are demonstrated that outweigh or justify any added cost; and increased costs can, and should be, reasonably absorbed, or funded, by the payers.

HRAP Standard No. 8. The project proposes to retain access to one or more services such that: maintaining the current level of access for each service is consistent with meeting the provisions in the HRAP; the cost to those who finance Vermont's health care system will not increase unreasonably;

improvements in clinical outcome or quality of care are demonstrated that outweigh or justify any added cost; and increased costs can, and should be, reasonably absorbed, or funded, by the payers.

HRAP Standard No. 16. HRAP standards relating to mental health and substance abuse services. The project will:

a. foster the State's focus on developing a coordinated system that encourages access to the appropriate and least restrictive level of care;

b. reflect the desirability of retaining the designated local provider network for the treatment of individuals with long-term and severe psychiatric needs;

c. meet or exceed appropriate access and quality standards, including the following:

1. Short term psychiatric care (not necessarily in a dedicated unit) and psychiatric emergency care should be available to most Vermonters within the geographic areas served by the designated agency system for mental health, substance abuse and developmental services.

2. Psychiatric services in dedicated units should be available to most Vermonters within the hospital service areas for the regional and tertiary hospitals.

3. Services should meet the six IOM Aims, with particular focus on achieving patient-centered (and family-centered) and safe care.

4. Services should address unmet need in Vermont for:

i. mental health, psychiatric and substance abuse services, particularly for children and adolescents.

ii. access to intensive outpatient programs.

iii. access to partial hospitalization programs.

iv. improved treatment for suicidal patients.

v. improved education and support for primary care providers, and better integration of primary care and mental health.

vi. approved care for people with co-occurring disorders.

vii. opiate addiction treatment (methadone and buprenorphine).

viii. availability of outpatient services in order to decrease the demand for more costly emergency and hospital-based care.

ix. sufficient mental health and substance abuse prevention, screening and aftercare services.

xi. peer recovery services.

xvii. increased peer-operated programs for mental health recovery.

xviii. diversion programs such as use of the 72-hour emergency hold programs and other initiatives in psychiatric units in the State's local general hospitals as effective tools in diverting admissions from the Vermont State Hospital or its successor facilities.

xix. adjustments to the available beds at VSH or its successors made in accordance with the capacity of community programs to provide effective services.

xx. maintaining current levels of local capacity and also supporting necessary increases in existing facilities.

xxi. additional beds in community hospitals, to be measured on a case-by-case basis.

xxii. capacity in therapeutic community residences to be kept at levels adequate to assure maintenance of the census at Vermont State Hospital and its successor institutions at appropriate levels.

xxiii. organizations providing mental health services to have linkage agreements with other appropriate providers in the community to assure a coordinated system of care that allows access to the appropriate level of care.

(b) Statutory Criterion No. 3. There is an identifiable, existing, or reasonably anticipated need for the proposed project which is appropriate for the applicant to provide.

(c) Statutory Criterion No. 4. The project will improve the quality of health care in the state or provide greater access to health care for Vermont's residents, or both.

(d) Statutory Criterion No. 6. The project will serve the public good.

9. On August 10, 2006 the Applicant filed a Revised Letter of Intent. The Revised Letter of Intent includes the information contained in the June 20, 2006 Letter of Intent, but also amended the Letter of Intent to: (i) change the name of the applicant from the Agency of Human Services to the Vermont Department of Health; (ii) eliminate reference to specific partner hospitals to host the expanded inpatient capacity; and (iii) expand the breadth of the request to one or more inpatient facilities.

10. On August 17, 2006 the Applicant filed its Conceptual Certificate of Need Application ("Application") for the proposed project. The Application describes the proposed new health care project as involving the construction, development and capital expenditure by or on behalf of a health care facility with a capital cost in excess of $20,000,000, and describes options for the creation of a replacement inpatient mental health facilities with capacity of 50 new beds.

11. On November 13, 2006 the Division ruled the Application complete for the purpose of beginning the formal review process.

12. On November 16, 2006, public notice of the Application, and of the time and place of the hearing before the Public Oversight Commission ("Commission") was made in newspapers having general circulation throughout the state.

13. The Commission held a public hearing on the Application on December 13, 2006. At its January 10, 2007 meeting, the Commission voted to recommend approval of the proposal, offering the following findings, observations and recommended conditions:

Findings and Observations:

1. *The comprehensive plan for treatment of patients with mental disorders as described in the Vermont Futures Plan focuses treatment towards community based settings with the objective of minimizing coercion or restrictions on patients while providing a safe and therapeutic environment. The inpatient program as described in the CON application represents one part of this overall integrated treatment proposal and provides treatment for the most acutely ill patients. The scale, operational expense, and capital needed for the acute care facility is appropriate only to the extent the overall plan can be implemented. An acute care solution which detracts from necessary funding of the community care components undermines the overall objectives of the Futures Plan.*
2. *The Applicant stated the planning requested in the CON would address a range of alternative solutions, but the overall impression from the presentation and application was that there is a preferred option to construct a new inpatient facility physically connected and an integral part of the main campus of Fletcher Allen Health Care in Burlington.*
3. *The purpose of the conceptual CON application is to provide detailed planning and cost estimates for the project. However, the POC's prior involvement with construction projects at the FAHC campus and the very preliminary discussion of costs by the Applicant suggest a capital expenditure approaching $100,000,000. This amount seems beyond the fiscal capability of the State of Vermont if the overall components of the Futures Project* [sic] *were to be implemented and adequately funded.*
4. *The Applicant focused on Medicaid financial reimbursement concerns if the inpatient facility were to be classified as an Institute for Mental Disease (IMD) and therefore be ineligible for federal reimbursement. This potential loss in matching funds was estimated at near $10,000,000 per year. The certainty of this risk was not clear. Questions were raised by some parties to the application suggesting that other states have found ways to classify facilities not physically connected to a hospital as being eligible for Medicaid reimbursement.*
5. *The Applicant and Dr. Robert Pierattini, Chairman of Psychiatry at UVM College of Medicine, stated the benefits of co-location of this inpatient psychiatric facility at a tertiary medical center. Some of the benefits related specifically to patient care and the changing treatment protocols of psychiatry*

where access to advanced technology was integral to diagnosis and treatment. Other benefits related to co-location at FAHC were an improved status and perception of psychiatric medicine by other health care practitioners and, possibly, the public. There was not a cost/benefit analysis of the value of these benefits justifying the potentially high cost of the applicant's preferred alternative. Somewhat contradictory testimony came from the psychologist of the current Vermont State Hospital in Waterbury who asserted that technology is currently appropriately used in diagnosis and treatment even though the Waterbury facility is "stand alone" and that the medical imaging currently used is predominantly accessed through Central Vermont Hospital, not the tertiary care facility of Fletcher Allen Health Care.

6. *It was very unclear whether the application appropriately addresses the mental health treatment needs of incarcerated individuals under control of the Department of Corrections. Estimates of the number of inmates in need of acute psychiatric care and hospitalization varied widely among parties and witnesses at the CON hearing. The Applicant's estimates of the number of inpatient beds needed are strongly at odds with the unmet need described by witnesses for interested parties.*
7. *For whatever set of reasons, the application makes little or no reference to the mental health plans of other states and the solutions they have implemented. The POC has a strong interest in not "reinventing the wheel" and believes we should thoroughly understand the solutions and costs in other states.*
8. *Quantified treatment outcomes data and benchmarks justifying the project were not sufficient to prove the proposed solution was the best alternative.*
9. *The need for inpatient beds was described as being variable based on the scale, funding, and success of the distributed community based programs which are the basis of the Futures Plan. Other uncertainties include the future direction of psychiatry practice as described by Dr. Pierattini. Given these uncertainties, and the long time period for which the facilities are being built (fifty years was the quote from Ken Libertoff), the plan should include some provision for flexibility of facilities to allow scaling the number of beds to meet need and changing medical practice without creating undue capital needs or increased operating expense. The appropriate alternative should have this capability while the preferred alternative presented was notable in having very little flexibility within its constrained architectural concept.*
10. *The interested parties requested a myriad of studies and analyses on issues such as storm water runoff, green space, traffic, and impact on governmental services. The CON produced must be comprehensive in addressing all these issues applicable to the site selected.*
11. *The Vermont State Employees Association makes a credible argument that the current personnel at the Waterbury facility have the specialized training and experience to provide good quality care. It is unclear how such a skilled human resource would be successfully transitioned to an inpatient facility in another location.*

12. *The long term financial sustainability of both the inpatient facility and the community based system is uncertain. Speaking for the Applicant, Beth Tanzman stated that inpatients are the responsibility of the state and they must be appropriately cared for. However, the current status of decertification of the Vermont State Hospital by federal agencies suggests that responsibility has not been consistently fulfilled. The Legislature's and Administrations' commitment to financial support of the mental health system both today and tomorrow cannot be guaranteed. Building a system which balances quality care with long term affordability will be critical to obtaining that financial commitment.*
13. *Perhaps the most notable finding or observation by the POC is that Fletcher Allen Health Care is not a party to this application although the preferred, and only detailed, alternative is at FAHC's Burlington campus. FAHC management may have had extensive involvement in the conceptual CON planning, but there is no information offered regarding how an inpatient CON at FAHC would be managed. Key questions involve management accountability and responsibility, not only to the patients, but also to the host community and all the other stakeholders in this venture. This question must be resolved.*

Recommendation:

Based on the information and testimony provided by the Applicant and the interested parties, and with consideration of the above findings, the Public Oversight Commission recommends to the Commissioner of BISHCA that the conceptual CON for this Docket be approved with the following conditions:

1. *The CON must explore and consider those alternative solutions for an inpatient psychiatric facility which provide a satisfactory and appropriate balance of the priorities of the Health Resource Allocation Plan and achieve the least capital and operating cost.*
2. *The CON must review the need and include in the CON proposal appropriate consideration for mental health treatment for inmates of the state correctional system. Issues associated with commingling of inmates and other patients must be appropriately addressed.*
3. *The CON must provide a long range perspective to include adequate funding sources for the inpatient facility and the community mental health systems. The long term perspective should also include flexibility in plans and facilities to make efficient adaptations to changing clinical and inpatient population requirements.*
4. *The CON must include sufficient research and analysis of systems in place or planned in other states to permit assessment of the effectiveness of the CON's preferred alternative.*
5. *Governance of the inpatient facility must be defined and the relevant parties must be in specified agreement on issues of operation, finances, accountability and management responsibilities.*
6. *The CON must provide a transition plan from the current to the planned facility which preserves to the extent reasonable the skills and capabilities*

already developed within the state's mental health system, including due consideration of retention of the current VSH workforce to address issues of continuance of care and quality of care.

7. *The CON must address or show alternate plans to address the issues of community impact raised by the various parties to the application.*
8. *The Applicant should comply with a CON schedule established by BISHCA with agreed upon timetables and planning benchmarks. The POC recommends the CON planning process be shortened to less than the two years proposed by the Applicant. The severity of the need argues for a more expedited plan and solution. Inclusion of an interim objective for recertification of the current VSH could be part of this plan in order to address quality of care issues for the extended period before completion of a new Vermont State Hospital. Progress against the agreed upon planning schedule should be reported to the POC.*
9. *Interested parties should be permitted open, transparent and meaningful access to the CON planning process to include their perspectives on the needs of their members, constituents, or those who utilize mental health services.*

14. On January 26, 2007 Commissioner Paulette Thabault assigned and delegated to Herbert W. Olson, General Counsel, the Commissioner's authority make a final decision in this proceeding.

15. On March 13, 2007 the Commissioner's designee issued an order extending the time to issue a final decision for an additional 30 days.

16. On April 2, 2007 the Commissioner's designee issued a Notice of Proposed Decision, and on April 9, 2007 a hearing was held to provide the parties an opportunity to be heard on the Notice of Proposed Decision.

Project Description:

17. The Applicant has applied for a Conceptual Certificate of Need with the following goals: to create new inpatient programs to enhance psychiatric inpatient care in Vermont, to replace the functions currently performed by Vermont State Hospital, and to create new community mental health service capacities to reduce Vermont's reliance on involuntary inpatient psychiatric care.

18. The Applicant seeks approval for authorization to carry out feasibility analyses of multiple options to accomplish the goals of the project, and to develop detailed plans for the most feasible models to provide for inpatient psychiatric care.

19. The Applicant has presented its preferred options for replacement of the Vermont State Hospital in its Application, and in testimony to the Public Oversight Commission, but the Applicant also requests permission to incur planning expenditures to analyze and compare the feasibility of a wide range of various options for the replacement of the Vermont State Hospital.

20. Specifically, the Applicant requests permission to incur planning expenditures relative to the following activities:

a) Plan to create new community capacities to reduce reliance on inpatient care, including throughout the next few years the following community capacities: residential services at the sub-acute and secure levels of care, crisis stabilization beds, peer support services, housing, transportation and a system of care management.
b) Carry out feasibility analyses of multiple options and to develop detailed plans for the most feasible models.
c) Incur planning expenditures to develop two new levels of inpatient psychiatric care:
    - Under the license of Fletcher Allen Health Care (FAHC) to develop programming at the specialized and intensive levels of care:
        A. Create a 40-bed stand alone psychiatric hospital on or off the Burlington campus, or
        B. Create a 40-bed program that is physically integrated with FAHC's existing inpatient services, or
        C. Create a 68-bed program combining FAHC's current 28-bed program with 40 new beds physically integrated with the inpatient services

        and
    - Under the License of Rutland Regional Medical Center:
        Establish six new psychiatric inpatient beds at the specialized level of care with the current program at Rutland Regional Medical Center via renovations and/or new construction to optimize current inpatient programming and bed capacity.

        and
    - Under the license of Retreat Healthcare:
        Establish the capability to provide up to six psychiatric inpatient beds at the specialized level of care at the Retreat Healthcare.
d) If developing new capacities at Rutland Regional Medical Center or the Retreat Healthcare does not prove feasible, consider increasing the number of beds planned for the primary program with FAHC. In addition, through the Phase II process, study other options that may become apparent.
e) Explore other options that might emerge during the detailed planning processes in Phase II.
f) Develop the program model for Intensive and Specialized levels of care.
g) Outside review of the program model for consistency with accreditation standards, appropriateness for the population to be served, and cost-effectiveness.
h) Cost modeling to implement the program model in both integrated and stand-alone settings, and with the proposed partners.
i) Architectural work to refine the "program of space" based on the program model developed.

j) Assess feasibility of on-and off campus sites for the primary program and campus sites for the smaller capacities based on the refined architectural program of space.

k) Develop partnership agreements for construction/renovation, and management phases.

l) Refine cost modeling for program operations and construction/renovation.

m) Develop architectural plans, site plans, and construction engineering.

n) Perform impact assessments including traffic studies, air pollution, waste water, and impact on the housing, human services and first responders of host communities.

o) Determine where to develop new crisis beds in consultation with the designated agency provider system, and informed by the recommendations of the mental health stakeholder community and the opportunities and feasibility of options identified by the designated agency provider network.

p) Determine what new peer support services will be implemented in consultation with the Vermont Psychiatric Survivors, informed by the recommendations of the mental health stakeholder community and the opportunities and feasibility of options identified by the peer community.

q) Develop a series of recommendations which include (but is not limited to) expanded resources for rental assistance subsidies and the creation of a housing development fund; determine what new housing services will be implemented in consultation with the AHS Housing and Transportation Coordinator, informed by the recommendations of the mental health stakeholder community and the opportunities and feasibility of options identified by the housing and not-for-profit housing development community, within appropriated resources.

r) Pilot and develop alternatives to transportation to involuntary care via Sheriff.

s) Obtain information regarding how other states, both in terms of facilities and programs, serve their patient populations most similar in need to the patients at the Vermont Department of Health ("VDH").

t) Determine the staffing model for the intensive and specialized levels of care.

u) Explore the preferred option to develop a 68-bed program on the main campus of Fletcher Allen with physical connection to the inpatient care services. This would include FAHC’s current psychiatric inpatient service.

v) If the preferred option is not feasible to develop, explore developing a 40 bed capacity on or off the Burlington campus.

w) Explore other options, including but not limited to: purchasing an existing facility, and building on available land at or near other hospitals.

x) Refocus on the development of secure residential capacity and work to establish program planning and development activities for secure residential services with the designated agency service providers.

y) Determine the impact of VDH's plans to create 16 community residential recovery beds at the sub acute level of care if adequate resources are appropriated by the legislature.

z) Determine the capacity of the proposed VSH replacement re: high security patients.

aa) Determine how VDH expects to fund the project to replace the facilities and relocate the services of the Vermont State Hospital.

bb) Determine how implementation of this project will improve the coordination of the continuum of mental health care, from primary care providers to the community partners, to the designated hospitals, to the Vermont State Hospital and prisons.

cc) Assess the impact the project will have on the identified need for new supportive housing resources for Vermont's citizens with mental illness and how adequate housing will facilitate discharge and limit the need for additional inpatient beds.

dd) Conduct planning that occurs in the context of considering the overall financial health of the designated hospital and agency service providers.

ee) Evaluate the current plan for 50 inpatient beds and the plan's adequacy in light of concerns expressed by the Howard Center about the assumptions regarding the impact of step-down and sub-acute services expansion as well as enhanced peer services models.

ff) Explore the issue of affordable housing in the Burlington community with respect to impacts resulting from changes in the location of Vermont State Hospital beds.

The applicable Certificate of Need criteria:

Statutory Criterion No. 1. The Application is consistent with the Health Resources Allocation Plan ("HRAP").

HRAP Standard #1. The project is needed to meet an identifiable, existing, or reasonably anticipated need.

21. The general need for the project is supported by the HRAP, which sets forth the need to replace the Vermont State Hospital beds, and calls for additional analysis on the total number of psychiatric beds needed for the services system. Specifically, the HRAP states that "The decertification of the Vermont State Hospital and the proposal for closure of that facility means that beds to replace the VSH beds will need to be developed. While the *Vermont State Hospital Futures Plan* suggests that there is not a need to add additional beds beyond those at VSH, capacity at other locations will need to be added to

replace the existing beds. There should be further analysis of the geographic distribution of capacity and need to determine the best location and number of beds." (HRAP, p. 46)

22. Epidemiological Catchment Area estimates indicate on-going need for inpatient services for individuals who have severe and persistent mental illness. Table 9 of the Application (HRAP Table 17) provides data on population need indicating the need for the project.

23. As to the proposed psychiatric replacement beds at Retreat Healthcare, Rutland Regional Medical Center and FAHC, these proposed beds are located in or adjacent to the counties with the largest estimated number of adults experiencing serious mental illness, the highest number of episodes of hospitalizations, and the highest number of people hospitalized with mental health diagnoses.

24. The findings and conclusions in the June 2006 study by Milliman Actuarial Consultants in their report *Actuarial Study of the Needed Bed Capacity for Adult Mental Health Inpatient Services* are adopted by reference. Specifically, the study projected needed adult mental health inpatient bed capacity (number of beds needed system wide) depending on the extent of implementation of the Vermont Futures Plan. Milliman examined three potential scenarios: (1) Status quo; (2) Partial implementation of the Futures plan; (3) Full implementation of the Futures Plan.

25. The Applicant's preferred option for the proposed project is consistent with the Milliman study, and calls for the current 54 bed capacity to be replaced with new and upgraded service capacity by adding 40 beds at FAHC, possibly 6 beds at Rutland Regional Medical Center and possibly four beds at Retreat Healthcare.

26. A fully implemented Futures Project would reduce the bed capacity at VSH to zero and increase bed capacity in Rutland to potentially a total of 25 beds. Retreat Healthcare would add four beds, raising their overall capacity. FAHC would increase their total bed capacity from 28 beds to 68 beds. The total state psychiatric bed capacity in 2012 would thus range from 157-167 and permit expansion or contraction as needed. This figure is consistent with the Milliman Actuarial projection of 156.2 total inpatient beds required under the conditions of full implementation of the Futures Plan.

HRAP Standard #2. The proposed health care project will facilitate the implementation of the HRAP concerning resources, needs, and appropriate system of delivery of health care services.

27. The record contains sufficient, credible, material and relevant evidence to support the Applicant's assertion that the proposed project addresses the following recommendations in the Health Resource Allocation Plan:

a) Implementation of the Futures Report recommendations as the foundation for determining future mental health and substance abuse inpatient planning (HRAP Recommendations, Inpatient, Emergency & Hospital-Based Services, Inpatient Services, Recommendation 5, p xi.).
b) Support implementation of the broad recommendations in the Vermont State Hospital Futures Plan, including an adequate number of beds to provide essential core services, including inpatient beds at an appropriate general

hospital (preferably an academic medical center); and intensive care beds at another hospital. (HRAP, p. 48)

c) Sub-acute beds in one to three locations. (HRAP, p. 48)
d) A secure residential facility. (HRAP, p. 48)
e) Additional diversion beds in two or three locations. (HRAP, p. 48)
f) Location of services in or near the most appropriate setting: academic medical centers, community hospitals, or other community-based facilities. (HRAP, p. 48)
g) Construction of new facilities when existing facilities are inadequate to meet the standard of care required for the service. (HRAP, p. 48)
h) This implementation should include a thorough clinical and operational planning process that includes the State's hospitals. (HRAP Recommendations, Mental Health / Substance Abuse Services, Recommendation 1, p. xii.)
i) Support proven models that integrate primary and specialty care with mental health and substance abuse care for providers who are either co-located or located off-site. . . .(HRAP Recommendations, Primary Care Services, Recommendation 8, p. xiv)
j) Advance proven models that integrate primary and specialty care with mental health and substance abuse care for providers who are either co-located or located off-site. .. (HRAP Recommendations, Specialty Care Services, Recommendation 5, p. xvi)
k) Increase resources for designated agency adult outpatient and substance abuse programs. (Secretary Charles P. Smith's Recommendations for the Future of Services Provided at the Vermont State Hospital, 2-4-05). This will help to ensure that Vermonters are treated in the most appropriate and least restrictive setting possible. (HRAP Recommendations, Mental Health/ Substance Abuse Services, Recommendation 3, p. xvii)
l) Integrate the State's private and public systems for mental health and substance abuse treatment to improve coordination of care and achieve a comprehensive continuum of care. (HRAP Recommendations, Mental Health and Substance Abuse Services, Recommendation 9, p. xviii)
m) Ensure that people experiencing mental health and substance abuse disorders have access to a full range of recovery and support services. (HRAP Recommendations, Mental Health / Substance Abuse Services, Recommendation 2, p. xix)
n) Explore models of collaboration among other health professionals in order to promote physical and mental health integration. (HRAP Recommendations, Mid-Level Practitioners, Recommendation 13, p. xxi)
o) Develop educational opportunities to assist non-mental health specialists in addressing mental health issues more extensively within the scope of their practice, in order to utilize psychiatric nurse practitioners more effectively. (HRAP Recommendations, Mid Level Practitioners, Recommendation 14, p. xxii)

HRAP Standard #3. The project will help meet the needs of medically underserved groups and the goals of universal access to health services.

28. The project will improve medical services for involuntary psychiatric patients who often have limited access to health care services in the community. Additional mental health and substance abuse services are a high priority item across all 16 hospital service areas studied in the hospital community needs assessments done in compliance with the HRAP development.

29. The Applicant states that siting a major inpatient psychiatric facility with FAHC (and strengthening community services) should relieve the pressure of mentally ill individuals seeking service through the emergency room, and increase access to care among the low-income community.

30. The Applicant states that the Rutland Regional Medical Center community needs assessment identified mental illness among the top 25 diagnostic related groups and that Rutland area residents are at greater risk for depression than Vermonters as a whole (12.3% vs. 11.3%) and have an age adjusted suicide rate of 15.2% compared to a statewide rate of 12.5%. The data presented by the Applicant suggest that access to augmented and integrated mental health services targeting Rutland and surrounding counties is needed. The Application notes that "while the primary focus of this CON Application is the development of adult inpatient mental health services, all the Community Needs Assessment data from Vermont hospitals describe the need for more substance abuse services and for the integration of these services with mental health services." (Application, p. 63) The Applicant explains that "A key element of the Futures Plan is enhanced treatment options and coordination of mental health and substance services. Implementation of the full Futures Plan will go far toward enhancing access among this group of medically underserved people regardless of socioeconomic or insurance status" and "enhanced support for community services [is] a central element of the Futures Plan [that] will address the wide-spread gap identified in outpatient services." (Application, p. 63)

HRAP Standard #4. The proposal fosters the Vermont Blueprint for Health: the Chronic Care Initiative.

31. The Vermont Blueprint for Health stresses improved chronic care through: knowledgeable consumers practicing improved self care, a practice team providing timely planned care, improved information, improved decision support, improved office systems, and supportive community, health care and public health infrastructure. In support of the Application with reference to the Blueprint for Health, the Applicant cites a pilot program by the Office of Vermont Health Access, community mental health agencies and primary care providers that integrates mental health care into settings where other health and social services are delivered. The Applicant also notes the development of a Futures Care Management system consistent with the electronic information system and the care management capabilities embodied in the Blueprint in the expectation of electronically linking and integrating the care record of persons with mental illness who have other medical conditions in order to improve care.

HRAP Standard #7. If the project proposes to, or is likely to, expand geographic access to services: the current travel time exceeds reasonable access standards; the cost to those who finance Vermont's health care system will not increase unreasonably; improvements in clinical outcome or quality of care are demonstrated that outweigh or justify any added cost; and increased costs can, and should be, reasonably absorbed, or funded, by the payers.

32. The information contained in the Application indicates that the counties with the highest estimated number of individuals experiencing serious mental illness are Chittenden, Rutland, Washington, Windsor, Franklin Grand Isle and Windham. The Applicant notes that while, with the exception of Rutland County, more than geographic access influences hospital selection, by dispersing intensive inpatient treatment beds to Burlington, Rutland and Brattleboro, it is likely that the most seriously mentally ill Vermonters would have the choice of increased access to appropriate care closer to their home. In the primary proposal of this application, FAHC is assumed to provide statewide coverage as a Tertiary Care Hospital, and to provide psychiatric services to residents of northern and western Vermont. The Retreat Health Care serves southern and eastern Vermont while Rutland Regional Medical Center provides psychiatric inpatient services to southern and western Vermont.

HRAP Standard #8. The project proposes to retain access to one or more services such that: maintaining the current level of access for each service is consistent with meeting the provisions in the HRAP; the cost to those who finance Vermont's health care system will not increase unreasonably; improvements in clinical outcome or quality of care are demonstrated that outweigh or justify any added cost; and increased costs can, and should be, reasonably absorbed, or funded, by the payers.

33. The Applicant offered information indicating that all existing services now provided at VSH will be continued in other settings and all intensive inpatient services will be provided in other hospitals. The Applicant plans to relocate 18 sub-acute beds from VSH to one or more community recovery residences for individuals who need intensive rehabilitation, but who do not need to be hospitalized. The Applicant states that this level of programming represents a new level of rehabilitation programming in Vermont: “The programs will be expected to offer best practices related to recovery, cognitive rehabilitation, occupational therapy leading to supported employment, treatment for substance abuse, peer support through blended peer staffing, and intensive treatment for issues related to trauma.” (Application, p. 67)

34. Additionally, the Applicant plans to relocate six residential care beds from the Vermont State Hospital to a secure residential setting. These would be reserved for individuals who are considered a danger to society and have been assigned to the custody of the Commissioner of Health, but who are not in need of hospital or sub-acute level care. From a clinical perspective their treatment is complete and they are no longer in need of hospital care, but they are perceived as posing a threat to public safety.

35. The Applicant specifically notes that the capacity of the system to serve its patient population is dependent upon the planned enhancement of existing adult outpatient services and the development of new outpatient capacities. Among these are

the proposed 10 diversion beds proposed to augment the existing 19 beds currently in the system (see *The Vermont Mental Health Futures Plan*, p 31).

HRAP Standard #16. HRAP standards relating to mental health and substance abuse services.

36. There is sufficient, credible, material and relevant evidence in the record to support findings that the project will:

a. foster the State's focus on developing a coordinated system that encourages access to the appropriate and least restrictive level of care;

b. reflect the desirability of retaining the designated local provider network for the treatment of individuals with long-term and severe psychiatric needs;

c. meet or exceed appropriate access and quality standards, including the following:

1. Short term psychiatric care (not necessarily in a dedicated unit) and psychiatric emergency care should be available to most Vermonters within the geographic areas served by the designated agency system for mental health, substance abuse and developmental services.

2. Psychiatric services in dedicated units should be available to most Vermonters within the hospital service areas for the regional and tertiary hospitals.

3. Services should meet the six IOM Aims, with particular focus on achieving patient-centered (and family-centered) and safe care.

4. Services should address unmet need in Vermont for:

i. mental health, psychiatric and substance abuse services, particularly for children and adolescents.

ii. access to intensive outpatient programs.

iii. access to partial hospitalization programs.

iv. improved treatment for suicidal patients.

v. improved education and support for primary care providers, and better integration of primary care and mental health.

vi. approved care for people with co-occurring disorders.

vii. opiate addiction treatment (methadone and buprenorphine).

viii. availability of outpatient services in order to decrease the demand for more costly emergency and hospital-based care.

ix. sufficient mental health and substance abuse prevention, screening and aftercare services.

xi. peer recovery services.

xvii. increased peer-operated programs for mental health recovery.

xviii. diversion programs such as use of the 72-hour emergency hold programs and other initiatives in psychiatric units in the State's local general hospitals as effective tools in diverting admissions from the Vermont State Hospital or its successor facilities.

xix. adjustments to the available beds at VSH or its successors made in accordance with the capacity of community programs to provide effective services.

xx. maintaining current levels of local capacity and also supporting necessary increases in existing facilities.

xxi. additional beds in community hospitals, to be measured on a case-by-case basis.

xxii. capacity in therapeutic community residences to be kept at levels adequate to assure maintenance of the census at Vermont State Hospital and its successor institutions at appropriate levels.

xxiii. organizations providing mental-health services to have linkage agreements with other appropriate providers in the community to assure a coordinated system of care that allows access to the appropriate level of care.

Statutory Criterion No. 3. There is an identifiable, existing, or reasonably anticipated need for the proposed project which is appropriate for the applicant to provide.

37. The identifiable existing need to replace the Vermont State Hospital is without question and the need to continue to provide the services and programs that are currently provided for at the Vermont State Hospital is also without question.

Statutory Criterion No. 4. The project will improve the quality of health care in the state or provide greater access to health care for Vermont's residents, or both.

38. Evidence presented by the Applicant shows the Vermont State Hospital was designed almost seventy years ago in an era in which the major treatment modalities were work and respite in a pastoral setting. Current standards for inpatient care require active treatment – medical, psychiatric, and psycho-social – by multi-disciplinary teams. The facility is old and there is concern with safety, security and control issues. Observations and inspections have identified many areas of problems with respect to the building. The physical structure impedes a diligent and caring staff from providing the highest quality of care possible. This plan will provide for facilities that promote a therapeutic environment and will provide greater access to Vermont residents in need of mental health care. Additionally, this plan moves Vermont closer to the ideal setting for mental health services that provides those services across a continuum of care that merges mental health care with other services including medical services. Some of the specific

physical problems with the current Vermont State Hospital facility that will be remedied by this plan include the following: (i) The over-all environment of the hospital does not meet the current therapeutic standard. (ii) The facility was built in an era that does not address a therapeutic environment that utilizes institutional materials and construction methods. (iii) The architecture is more like a correctional facility than a therapeutic health care facility with controlled spaces. (iv) Patient bedrooms do not meet the current standards for size and appointments and lack private bathrooms. (v) Patient bathrooms are accessed down long corridors, providing a control problem and areas for patient hiding places. (vi) The seclusion room does not meet current standards. (vii) The hospital lacks appropriate visiting space. (viii) There is no appropriate space for individual or group treatment meetings. If implemented as planned, the Vermont State Hospital replacement plan approved through this Conceptual CON will remedy current physical plant problems and permit programming that integrates mental health with other health services. Care will be patient-centered and individualized with the greatest opportunity for recovery. Programming will incorporate the Institute of Medicine aims, and will emphasize the importance of mental health to overall health. Geographic access will be improved as will the ability to provide services in the least restrictive setting and the most integrated fashion possible.

Statutory Criterion No. 6. The project will serve the public good.

39. There is sufficient, credible, material and relevant evidence in the record to support the Applicant's assertion that the project will serve the public good by moving Vermont further towards its vision of de-institutionalizing its programs and improving outcomes for persons with mental illness, establishing an infrastructure that ensures a full continuum of services in the most integrated and least restrictive environment, and incorporating the needs of certain populations served by the Department of Corrections.

40. The planning activities proposed by the Application will provide a valuable opportunity to further study and evaluate the options for a system that provides comprehensive mental health services to Vermont residents in need, and will permit Vermont's mental health system to identify the most appropriate plan for economically replacing services currently provided at the Vermont State Hospital with a state of the art system that maximizes the opportunity for recovery.

Adoption of Evidence

41. Testimony and evidence given to support findings and conclusions in this matter, in particular, the cited findings of need, are hereby adopted as credible, convincing, material and relevant to this Statement of Decision and the Conceptual Certificate of Need. All representations made by the Applicant throughout this process are considered material representations of fact submitted by the Applicant in order to gain approval of its application.

The Findings and Observations of the Public Oversight Commission

42. There is sufficient, adequate, competent, material and relevant evidence in the record to support the Findings and Observations of the Public Oversight Commission, which are incorporated by reference herein.

Conclusions of Law

A. Certificate of Need jurisdiction over the proposed project is based on the cost of the project, estimated to exceed $20,000,000. 18 V.S.A. § 9434(c)(1) and (e); 18 V.S.A. § 9432(7)(A). Jurisdiction over the proposed project is also based on the change in the number of licensed beds through addition, conversion or relocation. 18 V.S.A. § 9434(c)(4).

B. The Application is consistent with the Health Resources Allocation Plan, provided the Conditions established in Para**.** I**,** below, are attached to the Conceptual Certificate of Need. 18 V.S.A. § 9437(1). While there is considerable room for argument about how and in what manner to replace the Vermont State Hospital, and the extent to which any specific replacement option to be offered by the Applicant in its Phase II CON Application will be consistent with the HRAP and the other statutory criteria, the Applicant has offered the Conceptual CON Application in a manner that is consistent with the HRAP. The Applicant has also met its burden of demonstrating that it is prepared to engage in planning activities that will result in a Phase II Application which is consistent with the HRAP, provided the Conditions established in Para. I, below are attached to the Conceptual Certificate of Need.

C. There is an identifiable, existing, and reasonably anticipated need for the proposed project which is appropriate for the Applicant to provide, provided the Conditions established in Para. I, below, are attached to the Conceptual Certificate of Need. 18 V.S.A. § 9437(3). The Applicant by law is charged with the general responsibility for Vermont's mental health system, and with the specific responsibility of providing for inpatient mental treatment in designated hospitals or institutions in Vermont. 18 V.S.A. § 7201; 18 V.S.A. § 7401(6). There can be no doubt based on the record of this proceeding that a replacement for the Vermont State Hospital must be developed as soon as is possible and practicable.

D. The Applicant has met its burden of demonstrating that the project will improve the quality of health care in the state, provided the Conditions established in Para. I, below, are attached to the Conceptual Certificate of Need. 18 V.S.A. § 9437(4). There is an overwhelming consensus that replacement of the Vermont State Hospital with new inpatient facility services will greatly improve the quality of mental health care for Vermonters with mental illness, and that by improving the quality of care in Vermont's mental health system Vermont's residents will have greater access to necessary care and treatment.

E. The project will serve the public good, provided the Conditions established in Para. I, below, are attached to the Conceptual Certificate of Need. 18 V.S.A. § 9437(6).

F. Under the Certificate of Need laws, after the Public Oversight Commission has submitted its written findings and a recommendation, the Commissioner is required to review the Commission's recommendation and issue a final decision pursuant to the procedures set out at 18 V.S.A. §9440(d). In particular, the Commissioner is authorized to issue an approval “in whole or in part, or an approval subject to such conditions as the commissioner may impose in furtherance of the purposes of [the Certificate of Need

laws]". 18 V.S.A. §9440(d)(5). The Commissioner's authority is set out at 18 V.S.A. §9433, which provides that the Commissioner "shall exercise such duties and powers as shall be necessary for the implementation of the certificate of need program as provided by and consistent with this subchapter." The general rules, criteria and procedures for the program are then set out in detail at 18 V.S.A. § 9434, et seq. Within the scope of this statutory delegation, the Commissioner's actions and decisions are entitled to great deference. See In re Professional Nurses Service, 913 A.2d 381 386-87 (2006) (Court will not disturb Commissioner's statutory and regulatory interpretations absent a compelling indication of error). The Commissioner's authority is not, however, entirely without limit.

Certain limits on the Commissioner's authority are express: she or he is specifically denied the authority to mandate a new health care project not proposed by the applicant. 18 V.S.A. §9440(d)(5). Moreover, "[a]ny partial approval or conditional approval must be directly within the scope of the project proposed by the applicant and the criteria used in reviewing the application". Id. The statutory criteria are those established by 18 V.S.A. §9437.

It is a basic tenet of administrative law that an agency cannot act beyond the scope of its delegated authority. See C.Koch, Jr., 3 Administrative Law and Practice §12.13 ("Administrative agencies derive their power and authority from other sources. They are agents of those principals and cannot act beyond the intended grant of authority"). As the Vermont Supreme Court has recognized in discussing the relationship of agency rulemaking authority to enabling legislation, there must be "some nexus between the agency regulation, the activity it seeks to regulate, and the scope of the agency's grant of authority." Vermont Association of Realtors, Inc. v. State, 156 Vt 525, 530 (1991)(citing In re Club 107, 152 Vt at 323); See In re Agency of Administration, 141 Vt 68, 75 (1982)("An agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene"); E.g. In re Huntley, 177 Vt 596 (2004)(After examining the legislative grant of authority to the Environmental Board, the Supreme Court looks to the plain meaning of the statutory language and is guided by the legislature's intent, as evidenced by the statutes themselves. Because the Board's decision extended its power beyond the bounds authorized by its enabling legislation, the decision was reversed).

In addition to boundaries imposed by law on the Commissioner's decisions, an appropriate exercise of the Commissioner's broad discretion will include deference to the legitimate functions of other branches of government, and to the management and operational needs of the health care facilities and other entities that come before the Commissioner as applicants. The decision in this matter must faithfully and scrupulously observe the Certificate of Need laws, while recognizing that the Legislative Branch has a role in appropriating funds for this proposed project and overseeing the activities of the Department of Health. The Commissioner's designee calls on other branches of government to likewise respect the role of the Commissioner and the legal rights of the parties while a quasi-judicial proceeding is pending.

G. The Public Oversight Commission is to be commended for the diligent, thorough and thoughtful manner in which it has reviewed the Application, and the manner in which it has articulated its Findings, Observations, and Recommendations. The Commissioner's designee has fully considered the recommendations of the Commission relating to specific conditions to be attached to the Conceptual Certificate of Need. The Commissioner's designee has endeavored to tailor the conditions set forth in Para. I, below, to the intent of the Commission's recommendations, as well as to the boundaries of the Commissioner's authority and the appropriate exercise of the Commissioner's discretion. In some instances, the language of the specific conditions recommended by the Commission has been modified, where necessary or appropriate.

H. At the hearing held on April 9, 2007, several of the parties made specific requests or arguments relative to the Notice of Proposed Decision.

(a) The Applicant requested clarification of the Conditions in several respects. First, the Applicant noted the possibility that the Division of Mental Health might be reorganized, and requested recognition that the Conceptual Certificate of Need should expressly authorize any successor agency to engage in the activities authorized by the Certificate. The Commissioner's designee acknowledges this observation and the applicable Condition has been amended accordingly.

Second, the Applicant requested clarification that the "project" activities authorized by the Conceptual Certificate of Need are the architectural, engineering and other planning activities needed to prepare the Phase II Certificate of Need Application, not the actual construction and development of the facility to replace the Vermont State Hospital. The request is appropriate, and the Statement of Decision has been accordingly clarified.

Third, the Applicant requested clarification of the Applicant's obligation, established by Condition No. 14, below. The Applicant understands that it must include in its planning activities appropriate consideration for the inpatient mental health treatment of inmates, not to plan for the appropriate treatment of inmates who do not need inpatient treatment, and seeks confirmation that its understanding of the obligation created by this Condition is correct. Certainly, the central purpose of the Conceptual Certificate of Need is to plan for the replacement of inpatient mental health treatment capacity currently provided at the Vermont State Hospital, and to that extent the Applicant's planning activity obligations must focus on planning for the inpatient treatment needs of inmates and other offenders. The Department of Corrections, not the Department of Health, has been authorized by law to provide for the necessary and appropriate of mental treatment of inmates. 28 V.S.A. Chapter 11, Subchapter 6 (Services for Inmates with Serious Mental Illness); 28 V.S.A. § 101 (Administration of the Department). Accordingly, Condition No. 14, below, has been clarified; however, the Applicant's planning activities with respect to the inpatient needs of inmates and other offenders must, of necessity, take into consideration anticipated mental health treatment capacity in the correctional system in general (both for inmates and for offenders on released status), because an assessment of correctional system mental health treatment

capacity will have significant planning consequences for the nature and need for inpatient mental health treatment capacity for inmates and other offenders.

(b) Vermont Protection and Advocacy, an interested party, argued that Condition No. 13, below, should not include an obligation for the Applicant to consider, as one of many potential alternative solutions, a replacement facility that is owned and/or operated by the State of Vermont, because "building a new Vermont State Hospital would be a mistake." Vermont Protection and Advocacy appears to misunderstand the obligation imposed on the Applicant in Condition No. 13, below. Condition No. 13, below, does not attempt to narrow the options or substitute the Commissioner's judgment as to the appropriate alternatives to pursue in replacing the Vermont State Hospital. The gist of the recommendation of the Public Oversight Commission, in which the Commissioner's designee concurs, is that a thorough planning process that considers all reasonable alternatives is absolutely necessary. A thorough consideration of all reasonable alternatives is necessary first, because of the importance of making a good choice for the long term on an issue of this magnitude; and second, because it will be difficult to achieve public credibility in the planning process, and to conclude the planning process in a timely manner if the participants in this public policy debate (who sometimes do not agree), do not recognize that all reasonable alternatives have been considered. Consequently, a planning process that did not include consideration of a replacement facility that is owned and/or operated by the State of Vermont (provided it can be considered a reasonable alternative) might be a mistake, because without consideration of this alternative the planning process would not have sufficient credibility, and the goal of actually building an inpatient facility to replace the Vermont State Hospital could be further delayed.

(c) The Vermont State Employees Association ("VSEA"), an interested party, has made several requests for additional findings and conditions.

First, VSEA requests a condition of the Conceptual Certificate of Need to obligate the Applicant to investigate options for federal funding and to work with Vermont's Congressional delegation to obtain a waiver of the federal funding exclusion for "Institutes for Mental Disease", so as to more easily allow federal funding of a state-owned inpatient facility. While such activities may be appropriate and desirable, the Commissioner's designee concludes that such activities would not be an appropriate exercise of the Commissioner's discretion, and that such activities are more appropriately left to the Executive Branch agencies charged with the development and implementation of public policy for Vermont's mental health system, and to the Legislative Branch in fulfilling its oversight responsibilities.

Second, VSEA requests adoption of Finding No. 11 of the Public Oversight Commission, and requests the adoption of a condition requiring a "transition plan which would preserve the skills and capabilities of the current staff and ensure their retention." The Commissioner's designee notes that Finding No. 42, above, adopts the findings of the Commission, including Finding No. 11 of the Commission. The Commissioner's designee declines, however, to attached a condition or requirement that the Applicant include in its planning activities a transition plan designed to retain current employees.

Such a plan may, or may not be desirable, but requiring such a plan as a condition of the Conceptual Certificate of Need is beyond the lawful scope of the Commissioner's authority, and an inappropriate exercise of the Commissioner's discretion in reviewing this application. 18 V.S.A. §9440(d)(5)

Third, VSEA has characterized the Notice of Proposed Decision as "adopting the claim that co-location with an academic medical center is the best solution and will afford the best care." The Commissioner's designee concludes that no reasonable reading of the Notice of Proposed Decision, and especially a reading of the provisions of Condition No. 13, below, can so mischaracterize its intent and meaning. It will be the role and responsibility of the Applicant to consider all reasonable and appropriate alternative options for replacement inpatient services, after balancing many complex, difficult and competing factors and interests. In so concluding, this Statement of Decision should not be interpreted as pre-judging any particular alternative solution, nor as favoring or disfavoring the "academic medical center location" option.

Fourth, VSEA appears to request recognition of Finding Nos. 3 and 13 of the Public Oversight Commission, but as noted above the Statement of Decision has expressly adopted these findings in Finding No. 42, above.

Fifth, VSEA appears to request consideration of the mental health needs of correctional system inmates when planning for new replacement facility capacity. The Commissioner's designee notes that Condition No. 14, below, addresses the issue of the mental health needs of inmates and other offenders.

(d) Vermont Psychiatric Survivors and VSEA request inclusion of a condition similar to the Public Oversight Commission's recommended condition No. 9, relating to "open, transparent and meaningful access to the CON planning process."

This is a challenging issue for the Certificate of Need decision-making process to address. The Certificate of Need planning process already, and by law, provides an open and transparent process designed to afford the public and interested parties meaningful access to decisions approving capital expenditures for new health care facilities. Vermont Psychiatric Survivors and VSEA appear to assert that the existing public process is inadequate, and that the Applicant should involve the public more in its planning activities.

The Commissioner's designee does not make any conclusion in support of, or in opposition to this assertion, but concludes that imposing such an obligation on the Applicant, in the manner suggested by the Commission and the interested parties, is beyond the scope of the Commissioner's legal authority, because the proposed obligation cannot be factually determined to be necessary to further the purposes of the law, and an inappropriate exercise of the Commissioner's discretion. The Legislative Branch, with the Governor, has the authority to amend the law, or enact new laws if it wishes to impose additional public, procedural obligations on the Applicant. That a condition relating to "transparency" was imposed in a different Certificate of Need proceeding involving unlawful behavior in violation of the Certificate of Need regulatory

requirements and the criminal laws does not in itself justify imposing such an obligation in this proceeding.

On the other hand, the Commissioner's designee acknowledges and the parties have recognized that mental health consumer and other stakeholder participation is a critical element of the planning process. The Commissioner's designee further acknowledges and that if the planning process is not perceived as open and credible, there is a diminished likelihood that the planning process will be concluded in a timely manner, or that replacement inpatient programs will be built as soon as possible. Accordingly, Condition No. 19, below, has been modified to incorporate mental health consumer and other stakeholder participation into the Applicant's planning schedule.

I. Accordingly, the Commissioner's designee concludes that the law requires that the Conceptual Certificate of Need must be granted; and in furtherance of the purposes of this subchapter the following conditions and requirements must be attached to the Conceptual Certificate of Need. 18 V.S.A. § 9437; 18 V.S.A. § 9440(d)(5):

1. The Applicant shall comply with the scope of the project as designated in the Application. The Applicant shall also comply with all local and state ordinances, rules, laws and regulations applicable to the project, as such compliance is material to the granting of this Conceptual Certificate of Need.
2. Noncompliance with any provision of this Conceptual Certificate of Need or with any such ordinances, rules, laws or regulations may, at the Commissioner's discretion, constitute a violation of this Conceptual Certificate of Need and may be cause for enforcement action pursuant to 8 V.S.A. §15, 18 V.S.A. §9445 and any other applicable laws and rules. The Applicant shall notify the Commissioner if the Applicant's obligations with respect to any legislative action taken while this proceeding is pending, or during the planning period, conflicts with the terms and conditions of the Applicant's Conceptual Certificate of Need.
3. This Conceptual Certificate of Need is not transferable or assignable and is issued only for the premises and persons named in the application, provided that any successor agency to the Applicant is authorized to engage in the planning activities authorized by the Applicant's Conceptual Certificate of Need, in accordance with its terms, conditions and requirements.
4. This Conceptual Certificate of Need is limited to the architectural, engineering and other planning activities described herein.
5. If the Applicant contemplates or becomes aware of a non-material or material change to the scope or cost of the project described in its application and as designated in this Conceptual Certificate of Need, the Applicant shall file a notice of such change immediately with the Division. The Division shall review the proposed change and advise the Applicant whether the proposed change is subject to review under chapter 221 of Title 18, Vermont Statutes Annotated.
6. For purposes of this Conceptual Certificate of Need the terms "material change" and "nonmaterial change" shall be defined as in sections 8F and 8G, respectively,

of Regulation H-99-3, Certificate of Need Regulations adopted November 29, 1999, and Bulletin 112, dated March 12, 2004 as amended.

7. The Applicant shall file implementation reports with the Division, with copies to the interested parties, six months after the date of issuance of this Conceptual Certificate of Need and at six-month intervals thereafter until the Phase II CON Application is filed.
8. The implementation reports shall include the following information and analysis:
    a. An overview of the project, including unanticipated need for changes to the project.
    b. A description of the progress made toward completion of the project, including detailed assessment of the extent to which the project is on schedule.
    c. A spreadsheet statement of the expenditures made, from the advent of the project and from the date of the prior implementation report. This spreadsheet must be organized by project planning component and must detail by line item each expense within each planning component.
    d. Financial obligations incurred.
    e. Certification that no material or non-material changes are contemplated or have occurred.
9. The Commissioner, in her or his discretion, and after notice and an opportunity to be heard, may make such further orders as are necessary or desirable to accomplish the purposes of this Conceptual Certificate of Need, and to ensure compliance with the terms and conditions of this Conceptual Certificate of Need.
10. The Commissioner, in her or his discretion, and after notice to the parties and an opportunity to be heard, may order the earlier termination or amendment of these Conceptual Certificate of Need conditions, either on the Commissioner's own motion or upon a showing by a party that the condition is no longer necessary or that changed circumstances justify amendment of the condition.
11. All reports, notices, forms, information or submissions of any kind required to be submitted to the Division or the Commissioner as a condition of this Conceptual Certificate of Need shall be signed by the Applicant's agency head and verified by the agency head, or by her or his designated representative. Such verification shall be made on the form prescribed by HCA Bulletin No. 112 or by administrative rule, as applicable.
12. The project as approved, specifically the activities described in Finding Nos. 17 through 20 of this Statement of Decision and the activities required by the Conditions and Requirements attached to the Certificate of Need, shall be implemented within two years from the date of this Conceptual Certificate of Need or the Conceptual Certificate of Need shall become invalid and be deemed revoked.

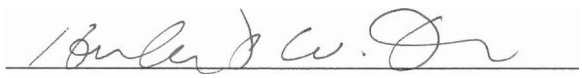
13. The planning activities authorized by this Conceptual Certificate of Need shall explore and consider those alternative solutions for an inpatient psychiatric facility which provide a satisfactory and appropriate balance of the priorities of the Health Resource Allocation Plan, and achieve the least expensive capital and operating cost. Consideration of alternative solutions shall include, if necessary to meet the Applicant's burden of proof, consideration of a replacement facility that is owned and/or operated by the State of Vermont.
14. The planning activities authorized by this Conceptual Certificate of Need shall review and include in the Phase II CON Application appropriate consideration of the need for inpatient mental health treatment for inmates and other offenders subject to the state correctional system, after giving due consideration for the overall mental health treatment capacity of the correctional system. The planning activities authorized by this Conceptual Certificate of Need shall appropriately address issues associated with commingling of inmates and other patients.
15. The planning activities authorized by this Conceptual Certificate of Need shall develop information and analysis describing a long range perspective of the funding needs and sources of adequate funding for the inpatient facility and for the community mental health system, and include such information and analysis in the Phase II CON Application so that the review process for the Phase II CON will be able to consider whether there will be an appropriate balance between the fiscal and other needs of the inpatient facilities, and the fiscal and other needs of the community mental health system. The information and analysis relating to this long term perspective should also include flexibility in plans and facilities to make efficient adaptations to changing clinical and inpatient population requirements.
16. The planning activities authorized by this Conceptual Certificate of Need shall include sufficient research and analysis of systems in place or planned in other states to permit assessment of the effectiveness of the Phase II CON plan’s preferred alternative, and thereby permit the Phase II CON review process to consider whether the Applicant has met its burden of proof with respect to the statutory criteria.
17. The planning activities authorized by this Conceptual Certificate of Need shall include the development of sufficient financial and operational information and analysis as to the Applicant's partners or participants in the replacement inpatient facility such that when the Phase II CON Application is reviewed, the Applicant will be able to meet its burden of demonstrating compliance with the relevant Certificate of Need criteria, including information concerning the cost of the project and its impact on the Applicant and its partners and participants. If necessary to meet its burden of proof, the Application shall include in its Phase II CON Application any relevant agreements with the Applicant's partners or participants on issues of operation, finances, accountability and management responsibilities.

18. The planning activities authorized by this Conceptual Certificate of Need shall permit the Applicant to include in the Phase II CON Application sufficient information concerning quality of care at the proposed facility that will permit the Applicant to demonstrate consistency with the relevant HRAP quality of care standards. In particular, the Phase II CON Application shall demonstrate that a sufficient number of professional staff and other trained staff will be available to adequately and appropriately support the replacement facility.
19. The Applicant shall establish a planning schedule, approved by the Division, that includes specific and achievable timetables and planning benchmarks for the completion of the planning process as soon as possible, and no later than the two years permitted by the Applicant's Conceptual Certificate of Need. The planning schedule shall include specific and achievable timetables and planning benchmarks for mental health consumer and other stakeholder participation.

Order

Accordingly, it is ORDERED that a Conceptual Certificate of Need shall issue in accordance with the terms, conditions and requirements established herein.

Dated at Montpelier, Vermont this 12th day of April, 2007



Herbert W. Olson, General Counsel
Commissioner's Designee

cc: Project file
Vermont Department of Health
Interested Parties and Amicus Curiae